Iskandar Coast Sdn Bhd v Ketua Pengarah Hasil Dalam Negeri

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COURT OF APPEAL (PUTRAJAYA) — CIVIL APPEAL NO W-01(A)-392–11 OF 2017
ABDUL RAHMAN SEBLI, ZALEHA YUSOF AND RHODZARIAH BUJANG JJCA
13 JUNE 2019

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Civil Procedure — Judicial review ('JR') — Whether recourse to JR improper when alternative avenue of appeal available — Landowner was issued notices of assessment to pay income tax on gains arising from compensation paid for compulsory acquisition of its lands — Instead of exercising right of appeal to Special Commissioners of Income Tax under s 99 of the Income Tax Act 1967 ('the ITA') landowner filed for JR to quash decision to issue the notices — Whether High Court was right to dismiss JR application on ground landowner had not shown exceptional circumstances why JR procedure should be used when appeal process was available — Whether landowner's attempt to show decision to issue assessment notices was illegal or made without jurisdiction failed — Whether although gains arising from compensation paid for compulsory acquisition of land were generally not subject to income tax, that principle did not apply if landowner knew of intended acquisition and intended to profit by it — Whether in such event income derived from compulsory acquisition was deemed to be gross income under s 24(1)(a) of the ITA and was taxable

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After receiving payment of compensation for the compulsory acquisition of its lands for the construction of a coastal highway, the appellant received notices of assessment with penalty from the respondent for not paying income tax on the gains arising from the compensation payment under s 24(1)(a) of the Income Tax Act 1967 ('the ITA'). Instead of exercising its right, under s 99 of the ITA, to appeal to the Special Commissioners of Income Tax ('the SCIT') against the notices of assessment, the appellant filed a judicial review ('JR') application to quash the respondent's decision to issue the notices. The High Court judge dismissed the application on the ground that the appellant had not shown any exceptional circumstances for opting to proceed by way of JR instead of exercising its right of appeal to the SCIT. In *Government of Malaysia & Anor v Jagdish Singh* [1987] 2 MLJ 185, the Supreme Court had held that where an appeal provision was available, certiorari should not normally issue unless: (i) there was a clear lack of jurisdiction; or (ii) there was a blatant failure to perform some statutory duty; or (iii) a serious breach of the principles of natural justice. In an attempt to bring its case for JR under limb (i) aforesaid, the appellant argued that the respondent had acted without jurisdiction, and therefore illegally, in issuing the notices of assessment because gains from the compensation paid for compulsory acquisition of the lands were not income

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earned in the appellant's ordinary course of business and therefore was not taxable. The High Court judge, however, found that because the appellant had prior knowledge of the acquisition and intended to profit by it, the gain derived from the compulsory acquisition was gross income subject to income tax under s 24(1)(a) of the ITA. In the instant appeal against the decision, the appellant argued that the High Court judge was wrong to infer that the appellant had prior knowledge of the compulsory acquisition as that amounted to saying that the appellant was in the business of acquiring lands with a view to making a profit from their compulsory acquisition.

Held, dismissing the appeal:

(1) The High Court judge had not committed any error in dismissing the appellant's JR application. On the contrary, based on the evidence before him, he was perfectly entitled to conclude that the appellant had not shown exceptional circumstances to warrant the JR process being used. There was nothing exceptional about the appellant's case that entitled it to by pass the domestic appeal process prescribed by s 99 of the ITA. Nor was there 'very exceptional circumstances' in the sense that there was a clear lack of jurisdiction, or a blatant failure to perform some statutory duty or a serious breach of the principles of natural justice that the respondent could be said to be guilty of when he issued the notices of assessment. The proper avenue for the appellant to challenge the respondent's decision was by appealing to the SCIT in accordance with s 99 of the ITA (see paras 21–23).

(2) The only grievance the appellant had against the respondent was that the latter's decision to issue the notices of assessment was made without jurisdiction; that the decision was illegal, in that the gains from the compulsory acquisition of the lands were not subject to income tax as they were not income earned in the appellant's ordinary course of business. The respondent, however, submitted that that principle could not be extended to cases where the recipient of the compensation had prior knowledge of the acquisition. The court was inclined to agree with the respondent's narrative of the facts and circumstances of the case to show that the appellant not only had prior knowledge that the lands would be acquired by the government but had intended to profit from the acquisition and that, accordingly, the income derived from the compulsory acquisition was deemed to be gross income under s 24(1)(a) of the ITA and was therefore taxable (see paras 27, 29, 31 & 40–43).

(3) The High Court judge was not plainly wrong in imputing knowledge to the appellant. In the overall scheme of things, it was clear that the appellant knew that the lands would be acquired by the government and it had intended to make a profit from the acquisition. Therefore, the

respondent had not acted unlawfully or without jurisdiction in issuing the notices of assessment for the years of assessment 2008, 2009 and 2013 (see para 46).

[Bahasa Malaysia summary

Selepas menerima bayaran pampasan bagi pemerolehan wajib tanahnya bagi pembinaan lebuh raya pantai, perayu menerima notis penilaian dengan penalti daripada responden kerana tidak membayar cukai pendapatan ke atas keuntungan yang timbul daripada bayaran pampasan di bawah s 24(1)(a) Akta Cukai Pendapatan 1967 ('ACP'). Daripada melaksanakan haknya, di bawah s 99 ACP, untuk merayu kepada Pesuruhjaya Khas Cukai Pendapatan ('PKCP') terhadap notis penilaian, perayu memfailkan permohonan semakan kehakiman ('SK') untuk membatalkan keputusan responden untuk mengeluarkan notis. Hakim Mahkamah Tinggi menolak permohonan atas alasan bahawa perayu tidak menunjukkan keadaan luar biasa untuk memilih untuk meneruskan dengan cara SK daripada melaksanakan haknya untuk merayu kepada PKCP. Di dalam *Government of Malaysia & Anor v Jagdish Singh* [1987] 2 MLJ 185, Mahkamah Agung memutuskan bahawa jika suatu peruntukan rayuan tersedia, kebiasaannya certiorari tidak seharusnya dikeluarkan kecuali (i) terdapat kekurangan bidang kuasa yang jelas; atau (ii) terdapat kegagalan terang-terangan untuk melaksanakan beberapa tugas statutori; atau (iii) pelanggaran serius prinsip keadilan semulajadi. Dalam usaha untuk membawa kesnya kepada SK di bawah cabang (i) seperti yang diatas, perayu berpendapat bahawa responden telah bertindak tanpa bidang kuasa, dan dengan itu secara tidak sah, dalam mengeluarkan notis penilaian kerana keuntungan daripada pampasan yang dibayar untuk pemerolehan wajib tanah adalah bukan pendapatan yang diperoleh dalam urusan perniagaan biasa perayu dan oleh itu tidak boleh dikenakan cukai. Hakim Mahkamah Tinggi bagaimanapun mendapati bahawa kerana perayu mempunyai pengetahuan terlebih dahulu tentang pemerolehan itu dan bertujuan untuk mendapatkan keuntungan olehnya, keuntungan yang diperoleh dari pengambilalihan wajib adalah pendapatan kasar tertakluk kepada cukai pendapatan di bawah s 24(1)(a) ACP. Dalam rayuan ini terhadap keputusan itu, perayu berpendapat bahawa hakim Mahkamah Tinggi adalah salah untuk membuat kesimpulan bahawa perayu mempunyai pengetahuan terlebih dahulu tentang pemerolehan wajib tersebut kerana itu menyatakan bahawa perayu berada dalam perniagaan pemerolehan tanah dengan tujuan untuk membuat keuntungan dari pemerolehan wajib itu.

Diputuskan, menolak rayuan:

(1) Hakim Mahkamah Tinggi tidak melakukan apa-apa kesilapan dalam menolak permohonan SK perayu. Sebaliknya, berdasarkan keterangan di hadapannya, beliau berhak untuk membuat kesimpulan bahawa perayu tidak menunjukkan keadaan luar biasa untuk menjamin proses SK yang

digunakan. Tidak ada yang luar biasa mengenai kes perayu yang berhak untuk memintas proses rayuan domestik yang ditetapkan oleh s 99 ACP. Juga tidak terdapat keadaan yang sangat luar biasa dalam erti kata bahawa terdapat kekurangan bidang kuasa yang jelas, atau kegagalan terang-terangan untuk melaksanakan beberapa tugas statutori atau pelanggaran serius prinsip keadilan semulajadi yang responden boleh dikatakan bersalah semasa dia mengeluarkan notis penilaian. Cara yang tepat bagi perayu untuk mencabar keputusan responden adalah dengan merayu kepada PKCP mengikut s 99 ACP (lihat perenggan 21–23).

(2) Satu-satunya rungutan yang dibuat oleh perayu terhadap responden adalah bahawa keputusan yang keduanya untuk mengeluarkan notis penilaian dibuat tanpa bidang kuasa; bahawa keputusan itu adalah tidak sah, kerana keuntungan dari pemerolehan wajib tanah itu tidak dikenakan cukai pendapatan kerana ianya bukan pendapatan yang diperoleh dalam urusan perniagaan biasa perayu. Walau bagaimanapun, responden mengemukakan bahawa prinsip itu tidak boleh dilanjutkan kepada kes-kes di mana penerima pampasan mempunyai pengetahuan terlebih dahulu mengenai pemerolehan itu. Mahkamah cenderung untuk bersetuju dengan naratif responden tentang fakta dan keadaan kes itu untuk menunjukkan bahawa perayu tidak hanya mempunyai pengetahuan terlebih dahulu bahawa tanah itu akan diperolehi oleh kerajaan tetapi bertujuan untuk mendapatkan keuntungan daripada pemerolehan itu dan, dengan itu, pendapatan yang diperoleh daripada pemerolehan wajib dianggap sebagai pendapatan kasar di bawah s 24(1)(a) ACP dan oleh itu dikenakan cukai (lihat perenggan 27, 29, 31 & 40–43).

(3) Hakim Mahkamah Tinggi tidak salah dalam menganggap pengetahuan kepada perayu. Dalam skim keseluruhan perkara, jelas bahawa perayu tahu bahawa tanah akan diperoleh oleh kerajaan dan ia bertujuan untuk membuat keuntungan dari pemerolehan. Oleh itu, responden tidak bertindak secara tidak sah atau tanpa bidang kuasa dalam mengeluarkan notis penilaian bagi tahun penilaian 2008, 2009 dan 2013 (lihat perenggan 46).]

Notes

For cases on judicial review in general, see 2(3) *Mallal's Digest* (5th Ed, 2017 Reissue) paras 5933–5993.

Cases referred to

Cape Brandy Syndicate v Inland Revenue Commissioners [1921] 1 KB 64, KBD (refd)

F Housing Sdn Bhd v Director General of Inland Revenue [1976] 2 MLJ 183 (refd)

Government of Malaysia & Anor v Jagdis Singh [1987] 2 MLJ 185; [1987] 1 CLJ 451, SC (folld)
Harbanslal Sahnia & Anor v Indianoil Corp Ltd & Others AIR 2003 SC 2120, SC (refd)
Ketua Pengarah Hasil Dalam Negeri v Alcatel-Lucent Malaysia Sdn Bhd & Anor [2017] 1 MLJ 563; [2017] 2 CLJ 1, FC (refd)
Ketua Pengarah Hasil Dalam Negeri v Penang Realty Sdn Bhd and another appeal [2006] 3 MLJ 597; [2006] 2 CLJ 835, CA (refd)
Khoo Ah Imm @ Chang Bee Kiam & Ors v Datuk Bandar Kuala Lumpur & Anor [1997] 2 MLJ 602, CA (refd)
Lower Perak Co-Operative Housing Society Bhd v Ketua Pengarah Hasil Dalam Negeri [1994] 2 MLJ 713; [1994] 3 CLJ 541, SC (distd)
Metacorp Development v Ketua Pengarah Hasil Dalam Negeri [2011] 5 MLJ 447; (2011) MSTC 30-024, HC (refd)
National Land Finance Co-Operative Society Ltd v Director General of Inland Revenue [1994] 1 MLJ 99; [1993] 2 AMR 52, SC (refd)
Preston v Inland Revenue Commissioners [1985] 2 All ER 327; [1985] AC 835, HL (refd)
Regina v Chief Constable of The Merseyside Police ex parte Calveley And Others [1986] QB 424, QBD (refd)
Robin Tan Pang Heng @ Muhammad Rizal bin Abdullah (suing as public officer at Penang Turf Club) v Ketua Pengarah Kesatuan Sekerja Malaysia & Anor [2011] 2 MLJ 457; [2010] 9 CLJ 505, FC (refd)
Ta Wu Realty Sdn Bhd v Ketua Pengarah Hasil Dalam Negeri & Anor [2009] 1 MLJ 555; [2008] 6 CLJ 235, CA (refd)
Vasudevan v T Damodaran & Anor [1981] 2 MLJ 150; [1981] CLJ 84; [1981] CLJ Rep 101, FC (refd)

Legislation referred to

Income Tax Act 1967 ss 4(a), 24(1), (1)(a), 99
Rules of Court 2012 O 53

Appeal from: Application for Judicial Review No WA-25–144–08 of 2016 (High Court, Kuala Lumpur)

DP Naban (S Saravana Kumar and Janice Tan Ying with him) (Lee Hishammuddin Allen & Gledhill) for the appellant.
Ahmad Isyak bin Mohd Hassan (Zaleha bt Adam and Ruzaidah bt Yaacob with him) (Inland Revenue Board) for the respondent.

Abdul Rahman Sebli JCA (delivering judgment of the court):

[1] This appeal by the appellant was against the decision of the High Court dismissing its judicial review application to quash the decision of the respondent in issuing the notices of assessment dated 8 August 2016 for the

A years of assessment 2008, 2009 and 2013.

[2] Having granted leave to the appellant to file for judicial review, the learned judge at the conclusion of the inter partes hearing decided that the dispute raised by the appellant should be dealt with by the Special Commissioners of Income Tax, like any other appeal on assessment, and not by way of judicial review. He found no exceptional circumstances to allow the appellant's application by way of judicial review instead of going through the domestic appeal process.

[3] After hearing arguments by both sides, we dismissed the appellant's appeal by a unanimous decision and these are our grounds. The facts leading to this appeal are as follows:

(a) the appellant was incorporated on 10 October 2006 under the name and style of Kota Selat Tebrau Sdn Bhd. It changed its name to Iskandar Waterfront Development Sdn Bhd on 19 November 2008. Then on 3 May 2010, the appellant changed its name to Iskandar Coast Sdn Bhd until now;

(b) in 2007, the appellant's shareholders injected parcels of land as part of its capital contribution amounting to approximately 3,962 acres;

(c) of the lands that were injected by the shareholders, seven parcels measuring approximately 81 acres were compulsorily acquired in 2008 and 2009 by the State Government of Johor for the purpose of constructing the coastal highway;

(d) consequent to the compulsory acquisition of the lands, the appellant received compensation amounting to RM85,970,820 in total;

(e) vide a letter dated 24 February 2015, the respondent requested the appellant's tax agent, Messrs Pricewaterhouse Coopers Taxation Services Sdn Bhd to provide the respondent with copies of the tax computation for the years of assessment 2011–2013;

(f) on 26 February 2015, the appellant's tax agent enclosed copies of the tax computation for the years of assessment 2011–2013 in a letter dated 26 February 2015 addressed to the respondent;

(g) from a review and inspection of the documents provided by the appellant, the respondent found out that the appellant had omitted to report the gain from the compensation received from the compulsory acquisition of the lands;

(h) vide a letter of findings dated 20 April 2015, the respondent informed the appellant that the gains arising from the compensation for the compulsorily acquired lands would be brought to income tax pursuant to

s 24(1)(a) of the Income Tax Act 1967 ('the ITA') for the years of assessment 2008 and 2009;

(i) vide letters dated 29 April 2015 and 19 May 2015, the appellant through its tax agent requested for an extension of time from the respondent to revert on the issues contained in the letters of findings;

(j) vide letters dated 26 May 2015, 31 March 2016 and 4 July 2017, the appellant through its tax agent responded to the respondent that the gains arising from the compensation for the compulsorily acquired lands were not subject to income tax and referred to the Supreme Court case of *Lower Perak Co-Operative Housing Society Bhd v Ketua Pengarah Hasil Dalam Negeri* [1994] 2 MLJ 713; [1994] 3 CLJ 541, and the High Court cases of *Ketua Pengarah Hasil Dalam Negeri v Penang Realty Sdn Bhd and another appeal* [2006] 3 MLJ 597; [2006] 2 CLJ 835 and *Metacorp Development v Ketua Pengarah Hasil Dalam Negeri* [2011] 5 MLJ 447; (2011) MSTC 30-024. The appellant emphasised that the primary dispute in the present matter, ie the applicability of s 24(1)(a) of the ITA was purely a question of law;

(k) vide letters dated 4 February 2016 and 30 June 2016, the respondent informed the appellant that he was still of the opinion that s 24(1) of the ITA and the case of *F Housing Sdn Bhd v Director General of Inland Revenue* [1976] 2 MLJ 183 applied. The respondent also maintained his decision that the gains arising from the compensation for the compulsorily acquired lands were subject to income tax; and

(l) the respondent then issued the impugned notices of assessment with penalty.

[4] The issue for our determination was whether the learned High Court judge had exercised his discretion correctly in dismissing the appellant's judicial review application on the ground that there were no exceptional circumstances to allow the appellant to proceed by way of judicial review.

[5] The procedure where the taxpayer is aggrieved by the assessment made by the Director General of Inland Revenue is prescribed by statute, ie by s 99 of the ITA, which is to appeal to the Special Commissioners of Income Tax. The provision reads as follows:

> 99(1) A person aggrieved by an assessment made in respect of him may appeal to the Special Commissioners against the assessment by giving the Director General within thirty days after service of the notice of assessment or, in the case of an appeal against an assessment made under section 92, within the first three months of the year of assessment following the year of assessment for which the assessment was made (or within such extended period as regards those days or months as may be allowed under section 100) a written notice of appeal in the prescribed form stating

A the grounds of appeal and containing such other particulars as may be required by that form.

[6] As a starting point, we accept the appellant's argument that the availability of a domestic appeal procedure does not mean that the appellant could have no recourse to judicial review. That option is always available and there is no requirement for the appellant to exhaust the remedy under s 99 of the ITA before resorting to O 53 of the Rules of Court 2012.

[7] There is however one important caveat before the judicial review jurisdiction could be exercised by the court, and that is the requirement to show 'very exceptional circumstances'. In the Supreme Court case of *Government of Malaysia & Anor v Jagdis Singh* [1987] 2 MLJ 185; [1987] 1 CLJ 451, Hashim Yeop A Sani SCJ (as he then was) delivering the judgment of the court held as follows at p 189 (MLJ):

> A clear principle is reiterated here ie, it is not a rigid rule that whenever there is an appeal procedure available to the applicant, he should be denied judicial review. Judicial review is always at the discretion of the court *but where there is another avenue or remedy open to the applicant, it will only be exercised in very exceptional circumstances*.
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> In *Re Preston* was a tax case. It was quite clear from the speeches of Their Lordships in the House of Lords that the Inland Revenue Commissioners were not immune from the process of judicial review. But what was also made clear is that *the remedy by way of judicial review is not to be available where an alternative remedy exists except in very exceptional cases.* (Emphasis added.)

[8] The Supreme Court then went on to answer the question posed for its determination by holding that where there is an appeal provision available, certiorari should not normally issue unless:

(a) there is shown a clear lack of jurisdiction; or

(b) a blatant failure to perform some statutory duty; or

(c) in appropriate cases a serious breach of the principles of natural justice.

[9] The House of Lords decision in *Preston v Inland Revenue Commissioners* [1985] 2 All ER 327; [1985] AC 835 cited by the Supreme Court is particularly relevant where at p 862 Lord Templeman said:

> Judicial review process should not be allowed to supplant the normal statutory appeal procedure [but] the present circumstances are exceptional in that the appeal procedure provided by s 462 cannot begin to operate if the conduct of the commissioners in initiating proceedings under s 460 [which relates to the cancellation of tax advantages] was unlawful.

[10] Obviously the reason why the House of Lords considered the case to be exceptional was because the appeal procedure could not begin to operate due to the unlawfulness of the commissioners' conduct. A

[11] In the present appeal, the appellant was not faced with such impediment. Going by this authority, the appellant must show that the respondent was guilty of unlawful conduct in issuing the notices of assessment to entitle it to proceed by way of judicial review instead of the domestic appeal process. B

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[12] In *Khoo Ah Imm @ Chang Bee Kiam & Ors v Datuk Bandar Kuala Lumpur & Anor* [1997] 2 MLJ 602 Gopal Sri Ram JCA (as he then was) relying on *Jagdish Singh* said at p 525:

> One of the grounds on which the remedy of certiorari may be withheld is where the applicant is able to obtain better or at least equally efficacious relief either in other proceedings or at an alternative forum. Sometimes the alternative remedy is given by statute. See, *Government of Malaysia & Anor v Jagdish Singh* [1987] 2 MLJ 185; [1987] 1 CLJ 415; [1987] CLJ Rep 110. D

[13] There are two other cases that were decided along the same line: See *Robin Tan Pang Heng @ Muhammad Rizal bin Abdullah (suing as public officer at Penang Turf Club) v Ketua Pengarah Kesatuan Sekerja Malaysia & Anor* [2011] 2 MLJ 457; [2010] 9 CLJ 505 (FC) and *Regina v Chief Constable of The Merseyside Police ex parte Calveley And Others* [1986] QB 424. In the latter decision, it was held by the English Court of Appeal that: E F

> ... the judicial review jurisdiction would not normally be exercised where there was an alternative remedy by way of appeal, save in exceptional circumstances; that the speed of the alternative procedure, whether it was as convenient and whether the matter depended on some particular or technical knowledge available to the appellate body were all factors to be taken into account in considering the circumstances were exceptional. G

[14] Learned counsel for the appellant referred to the Indian Supreme Court case of *Harbanslal Sahnia & Anor v Indianoil Corp Ltd & Others* AIR 2003 SC 2120 where RC Lahoti J delivering the judgment of the court said: H

> So far as the view taken by the High Court that the remedy by way of recourse to arbitration clause was available to the appellants and therefore the writ petition filed by the appellants was liable to be dismissed, suffice it to observe that the rule of exclusion of writ jurisdiction by availability of an alternative remedy is a rule of discretion and not one of compulsion. In an appropriate case, in spite of availability of the alternative remedy, the High Court may still exercise its writ jurisdiction in at least three contingencies; (i) where the writ petition seeks enforcement of any of the Fundamental Rights; (ii) where there is failure of principles of natural justice or, (iii) where the orders or proceedings are wholly without jurisdiction or the vires of I

A an Act and is challenged. (See *Whirlpool Corporation v Registrar of Trade Marks, Mumbai and Others* [1998] 8 SCC 11).

[15] What we can gather from this Indian authority is that the position in India is no different from the position in Malaysia in that the exercise of the court's 'writ jurisdiction' in India is only available 'in an appropriate case', as illustrated by the three examples of contingency given by the court.

[16] Taking *Jagdish Singh* as the guiding principle, the position of the appellant vis a vis the respondent is clear — since there is another avenue open to the appellant to ventilate its dissatisfaction over the decision of the respondent in issuing the impugned notices of assessment, the court would only exercise its judicial review jurisdiction in very exceptional circumstances.

[17] Exceptional means 'unusual; not typical': see *Concise Oxford English Dictionary* (11th Ed). Very exceptional circumstances therefore means very unusual circumstances. What amounts to very unusual circumstances must depend on the factual matrix of each case.

[18] As for the exercise of discretion, it is axiomatic that the power must be exercised judiciously and not capriciously, least of all wantonly. Judiciously means done with sensible judgment and not on an unaccountable mood swing.

[19] As to the proper approach to be taken by the appellate court in deciding whether to allow or to dismiss an appeal against the exercise of discretion by the lower court, we need only refer to the Federal Court case of *Vasudevan v T Damodaran & Anor* [1981] 2 MLJ 150; [1981] CLJ 84; [1981] CLJ Rep 101 where Abdoolcader J (as he then was) delivering the judgment of the court said at p 151 (MLJ); pp 103–104 (CLJ):

> (b) Review of discretion by an appellate court
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> There is a catenation of cases on this point and it will suffice to cull and refer to a few which restate the well-settled principles. An appellate court can review questions of discretion if it is clearly satisfied that the judge was wrong but there is a presumption that the judge has rightly exercised his discretion and the appellate court must not reverse the judge's decision on a mere 'measuring cast' or on a bare balance as the mere idea of discretion involves room for choice and for differences of opinion (*Charles Osenton & Co v Johnston* [1942] AC 130, 148 (at p 148) per Lord Wright). The Privy Council in *Ratnam v Cumarasamy & Anor* [1965] 1 MLJ 228; [1964] 1 LNS 237 that an appellate court will not interfere with the discretion exercised by a lower court unless it is clearly satisfied that the discretion had been exercised on a wrong principle and should have been exercised in a contrary way or that there has been a miscarriage of justice, referring to *Evans v Bartlam* [1937] AC 473. The House of Lords, approving the decision of the English Court of Appeal in *Ward v James* [1966] 1 QB 273, held to the same effect in *Birkett v James* [1978] AC 297,

317, 326 (at pp 317, 326). For good measure, we would refer to the felicitous expression of Goulding J in *Re Reed (a debtor)* [1979] 2 All ER 22, 25 on this point (at p 25): A

> ... the duties of an appellate court in such matter as this are, in my judgment, confined to those normally exercisable where the lower court has a discretion, that is to say, we are not justified in setting aside or varying an order simply because we may think we might have come to a different conclusion ourselves on similar material. We can only interfere if either we can see that the court below has applied a wrong principle, or has taken into account matters that are in law irrelevant, or has excluded matters that it ought to have taken into account, or otherwise that no court, properly instructing itself in the law, could have come to the conclusion which in fact was arrived at. B C

[20] The question therefore is whether the learned judge had exercised his discretion on a wrong principle and should have been exercised in a contrary way or that there has been a miscarriage of justice when he decided to dismiss the appellant's application for judicial review. D

[21] Having given the matter careful consideration, we were not persuaded that the learned judge had fallen into such error. On the contrary, we were of the view that on the evidence before him, the learned judge was perfectly entitled to come to the conclusion that the appellant had not shown exceptional circumstances. E

[22] There is nothing exceptional about the appellant's case to entitle it to by pass the domestic appeal process prescribed by s 99 of the ITA. Nor could we find 'very exceptional circumstances', in the sense that there was a clear lack of jurisdiction, or a blatant failure to perform some statutory duty, or a serious breach of the principles of natural justice that the respondent can be said to be guilty of when he issued the notices of assessment. F G

[23] The dispute was over the decision of the respondent to issue the notices of assessment for the years of assessment 2008, 2009 and 2013, for which the appellant's remedy lies in appealing to the Special Commissioners in accordance with s 99 of the ITA. That would be the proper avenue for the appellant to challenge the decision of the respondent: *Ketua Pengarah Hasil Dalam Negeri v Alcatel-Lucent Malaysia Sdn Bhd & Anor* [2017] 1 MLJ 563; [2017] 2 CLJ 1. H

[24] This court's decision in *Ta Wu Realty Sdn Bhd v Ketua Pengarah Hasil Dalam Negeri & Anor* [2009] 1 MLJ 555; [2008] 6 CLJ 235 is also relevant where it was held that any question pertaining to the merits of the assessment made by the Director General of Inland Revenue is a matter that is better reserved for the Special Commissioners or a matter to be transmitted to the I

A High Court by way of case stated. At para [6] of the judgment this is what the court said:

> [6] Before the Special Commissioners a taxpayer, in this case the appellant, will have all the opportunity to ventilate his disgruntlement, with every opportunity to tender exhibits, and give oral evidence if necessary (*Director-General of Inland Revenue v Lahad Datu Timber Sdn Bhd* [1978] 1 MLJ 203). If the taxpayer is successful, the tax so paid will be refunded in full. A taxpayer has an additional safeguard in that in the event a dispute on questions of law is identified it may be transmitted to the High Court by way of stated.

[25] The point needs to be emphasised that the right of appeal provided by s 99 of the ITA is a right accorded by statute, which means the Special Commissioners had no discretion not to hear the appellant's appeal on the merits if the appellant had proceeded under s 99 of the ITA. In contrast, judicial review is always at the discretion of the court.

[26] The appellant's contention that the matter should preferably be dealt with by way of judicial review rather than by way of an appeal to the Special Commissioners was premised on the following arguments:

(a) lack of jurisdiction committed by the respondent;

(b) the appellant had demonstrated the existence of exceptional circumstances through the respondent's clear lack of jurisdiction in issuing the impugned notices of assessment; and

(c) in issuing the impugned notices of assessment, the respondent disregarded the legal position as established by the superior courts and the High Court whereby gains arising from compulsory acquisition of land are not subject to income tax.

[27] Going by the arguments, it is clear that the only grievance that the appellant had against the respondent was that his decision to issue the notices of assessment was made without jurisdiction. It was not the appellant's case that the respondent had blatantly failed to perform some statutory duty or had committed some serious breach of natural justice.

[28] In support of its argument that the respondent acted without jurisdiction, the appellant relied heavily on three cases, namely (1) the Supreme Court case of *Lower Perak*; (2) the Court of Appeal case of *Ketua Pengarah Hasil Dalam Negeri v Penang Realty Sdn Bhd and another appeal* [2006] 3 MLJ 597; [2006] 2 CLJ 835; and (3) the High Court case of *Metacorp* all of which decided that gains arising from compensation for the compulsory acquisition of land are not subject to income tax as the gains were not income earned in the ordinary course of the taxpayer's business. It was submitted that the element of

compulsion vitiates the intention to trade: *Lower Perak*. A

[29] The basis for learned counsel to argue that the respondent acted without jurisdiction in issuing the notices of assessment was that the gains from the compulsory acquisition of the lands were not subject to tax as they were not income earned in the appellant's ordinary course of business. In other words, the contention was that the decision of the respondent to impose tax on gains from the compulsory acquisition of the lands was illegal. B

[30] So the question in the present appeal was whether the respondent was in breach of the law when he issued the impugned notices of assessment. The respondent's argument was that he was not. C

[31] It was submitted that while any gain or profit from compulsory acquisition of land by the government is not taxable, in which case it would be unlawful for the respondent to impose income tax, this cannot be extended to cases where the recipients had prior knowledge of the acquisition. D

[32] In support of the argument, learned counsel for the respondent relied on the decision of the High Court in *F Housing*. In that case, land belonging to the appellant company had been acquired by the government. Compensation in the sum of $1,407,139.69 was paid to the appellant company and tax was assessed on the difference between this and the purchase price of the land. E

F

[33] The question for the High Court's determination was whether the difference between the compensation awarded and the purchase price was assessable to income tax under s 4(a) of the Income Tax Act 1967 which provides as follows:

> 4 Classes of income on which tax is chargeable G
>
> Subject to this Act, the income upon which tax is chargeable under this Act is income in respect of —
>
> (a) Gains or profits from a business, for whatever period of time carried on;

H

[34] Mohamed Azmi J (as he then was) in dismissing the appellant's appeal held, inter alia, as follows:

> The appellant company bought the land for development in full knowledge of the fact that the property was to be acquired by the government, and, by taking various steps to develop the land, they were successful in convincing the Collector of Land Revenue that the undeveloped land had an immediate potential value as building land and that its market value at the relevant date of acquisition was higher than the purchase price — thereby acquiring for the company an income of $298,837 being the difference between the acquisition award and the purchase price. On these facts, I

I hold that the compensation should be treated as income and, therefore, taxable as gains or profits from a business within s 4(a) of the Income Tax Act 1967.

[35] The appellant however contended that the case is not applicable as the facts are different. It was pointed out that the appellant company in that case had full knowledge that the land was to be acquired, unlike the appellant in the present appeal who had no knowledge that the lands were to be acquired by the government when they were transferred to it by the shareholders.

[36] It was further submitted that there is no evidence that the transferees of the lands knew at the time when they transferred the land to the appellant that these lands were to be acquired by the government.

[37] The contention was that the learned High Court judge was wrong to impute knowledge of the compulsory acquisition to the appellant as that would amount to concluding that the appellant was trading in land by acquiring the lands and waiting for them to be compulsorily acquired.

[38] To determine whether the appellant had prior knowledge of the government's intention to acquire the lands, it is necessary to look at the attendant facts prior to the compulsory acquisition of the lands.

[39] First of all, it is undisputed that the appellant is a subsidiary of Iskandar Investment Bhd ('IIB') which holds 80% shares in the appellant company. IBB (formerly known as South Johor Investment Corp Bhd) on its part is a subsidiary of Khazanah Nasional Bhd ('Khazanah') which has 60% shareholding in IIB. Khazanah being the majority shareholder in IBB is therefore the holding or parent company of the appellant.

[40] The respondent's contention that the appellant had prior knowledge of the government's intended acquisition of the lands is borne out by the following facts:

(a) Khazanah is the entity responsible for drafting the 'Comprehensive Development Plan' ('CDP') for Wilayah Iskandar, now known as Iskandar Malaysia. The construction of the coastal highway from the city centre to Nusajaya was one of the development agendas stated in the CDP;

(b) based on the CDP, in July 2005, the government tasked Khazanah to conduct a feasibility study for the development of Wilayah Iskandar;

(c) following that, in October 2005, based on the 'Conceptual Outline Plan' that was presented by Khazanah for the development of Wilayah Iskandar, Khazanah was tasked to develop 'a detailed and comprehensive Master Plan' for Wilayah Iskandar;

(d) in March 2006, the development of Wilayah Iskandar was launched by the then Prime Minister as part of the agendas in the Ninth Malaysia Plan. The CDP that had been completed by Khazanah would be used in developing Wilayah Iskandar;

(e) one of the agendas in the CDP was to repair the connectivity between the cities through the building of roads and highways as well as upgrading the existing roads and highways. The land acquisition for the development of the coastal highway that connects Johor Bahru, Danga Bay and Nusajaya was included in this plan. The draft proposal to construct the new road from Johor Bahru to Nusajaya was also stated in the CDP. Indirectly therefore, the appellant had knowledge that the lands would be acquired for the purpose of the road construction from the city centre to Nusajaya;

(f) on 10 October 2006, the appellant company was formed by its parent company Khazanah. This was after Wilayah Iskandar was launched. Khazanah, being the parent company of the appellant, was the party responsible for drafting the CDP;

(g) further, apart from IIB, the other shareholders of the appellant company are Danga Bay Holdings Sdn Bhd ('Danga Bay Holdings') and Kumpulan Prasarana Rakyat Johor Sdn Bhd ('KPRJ'); and

(h) subsequently, via a subscription agreement dated 17 January 2007 and a supplemental agreement dated 18 June 2007, the appellant acquired lands from its shareholders, which are Khazanah, IIB, Danga Bay Holdings and KPRJ. The lands were part of the capital injection into the appellant company by its shareholders.

[41] Based on the relationship between the three entities, namely the appellant company, IIB and Khazanah through their shareholdings, and the surrounding circumstances of the case, it was submitted by learned counsel for the respondent that not only did the appellant have prior knowledge that the lands would be acquired by the government but had intended to profit from the acquisition.

[42] It was further submitted that the appellant's knowledge and intention to profit from the compulsory acquisition is apparent from its move to apply to the Johor Land and Mines Office to change the status of the lands to freehold from agricultural lands and leasehold for 99 years.

[43] We were inclined to agree with the respondent. Thus, since the

appellant had prior knowledge of the intended acquisition, the income that it derived from the compulsory acquisition of the lands is deemed to be gross income under sub-s 24(1)(a) of the ITA and is therefore taxable. Section 24(1)(a) provides as follows:

> 24(1) Where in the relevant period a debt owing to the relevant person arises in respect of —
>
> (a) Any stock in trade sold (or parted with on requisition or compulsory acquisition or in a similar manner) in or before the relevant period in the course of carrying on a business;
>
> (b) ...
>
> (c) ...
>
> the amount of the debt shall be treated as gross income of the relevant person from the business for the relevant period.

[44] With due respect to learned counsel for the appellant, his reliance on the Supreme Court case of *Lower Perak* is misconceived. In the first place, the appellant in that case proceeded by way of an appeal to the Special Commissioners pursuant to s 99 of the ITA before bringing the matter up on appeal to the High Court by way of case stated, unlike the appellant in the present case who took a different route by going straight to the High Court for a review of the respondent's decision.

[45] The facts of *Lower Perak* are also distinguishable, as can be seen from the following observations by Edgar Joseph Jr SCJ delivering the unanimous decision of the Supreme Court:

> It is manifestly clear that the dominant purpose and also the dominant motive of the taxpayer was not to make profit out of the transactions with the developer but to provide a roof over the heads of its members, and so, the resulting profit could not have been derived from a trading transaction or an adventure in the nature of trade but was an accretation to capital not liable to tax.

[46] We rejected the appellant's contention that the learned judge was plainly wrong in imputing knowledge on the part of the appellant. In the overall scheme of things, it is clear the appellant knew that the lands would be acquired by the government and had intended to make a profit from the acquisition. Therefore, the respondent had not acted unlawfully and without jurisdiction in issuing the notices of assessment for the years of assessment 2008, 2009 and 2013.

[47] It is the duty of the respondent to administer each and every provision of law contained in the ITA and the duty of the court to apply the law to the facts of the case. Justice Rowlatt in *Cape Brandy Syndicate v Inland Revenue*

Commissioners [1921] 1 KB 64, which was referred to by the Supreme Court in *National Land Finance Co-Operative Society Ltd v Director General of Inland Revenue* [1994] 1 MLJ 99; [1993] 2 AMR 52 said this in his judgment:

> It simply means that in taxing Act one has to look merely at what is clearly said. There is no room for any intendment. There is no equity about tax. There is presumption as to tax. Nothing is to be read in, nothing is to be implied. One can look fairly at the language used.

[48] It was for all the reasons aforesaid that we dismissed the appellant's appeal with costs of RM30,000. The deposit was ordered to be refunded to the appellant.

Appeal dismissed.

Reported by Ashok Kumar